SIXTH CIRCUIT EDITION

Fowler v. Board of Education: The Scope of Teachers' Free Speech Rights

*R. George Wright**

I. INTRODUCTION

On its distinctive facts, *Fowler v. Board of Education of Lincoln County, Kentucky*[1] is almost ideally suited as a vehicle for reexamining some of the "deeper" issues associated with the in-school speech of public high school teachers in particular and with free speech law in general. In light of its facts and the prior case law, it is hardly surprising that *Fowler* evoked three separate and distinct responses from the Sixth Circuit panel deciding the case. This Article, through a shift in the formulation of the precise issues presented, presents a fourth approach. The justification for this apparently perverse multiplication of complexity is simply that it allows us to see the virtues of each of the three approaches taken by the Sixth Circuit, while, at the same time, enabling us to examine each approach's limitations under the circumstances of *Fowler*.

To begin by temporarily oversimplifying, *Fowler* involved a tenured public high school teacher who was subjected to the rather draconian sanction of dismissal after a school board hearing because she had showed a popular "R" rated movie on a non-instructional day to her morning and afternoon class of fourteen to seventeen year old students, while exercising only desultory attempts to edit the video portion of the movie.[2]

At the federal court trial on her wrongful discharge claim, the teacher, Jacqueline Fowler, was awarded reinstatement and money

---

* Associate Professor of Law, Cumberland School of Law, Samford University.

1. 819 F.2d 657 (6th Cir. 1987) [petition for writ of certiorari to be sought in September, 1987, per counsel for appellant].

2. *Id.* at 658-59.

damages.[3] On appeal to the Sixth Circuit, her judgment was vacated and her claim dismissed.[4] No single approach commanded a majority of the Sixth Circuit panel. To oversimplify the law as much as the facts, Judge Milburn concluded that Fowler had not engaged in speech containing the expressive or communicative elements necessary to invoke the protection of the free speech clause.[5] Judge Peck, while concurring in the majority result, reasoned that Ms. Fowler had engaged in constitutionally protected speech, and had shown that her protected speech was a substantial and motivating factor in the School Board's decision to discharge her. However, in his view, the Board had then met its burden of showing that it would have dismissed her for her conduct and poor judgment anyway. That is, Judge Peck concluded that the court had not premised its decision upon those aspects of her speech or conduct that were constitutionally protected, nor upon any motivation on the part of the Board to impose sanctions attributable to such protected activity.[6] Judge Merritt dissented. In his view, at least *some* protected speech, either in the category of instruction or entertainment, was present. In contrast to Judge Peck, he concluded that the Board had failed to prove that Fowler's speech was severable into *protected* "substance," messages, or meanings on the one hand, and *unprotected* means, or "form," featuring violence, sexuality, and vulgarity on the other. In his view, the Board did not meet its burden of showing that it would have terminated Fowler for reasons other than its admitted disagreement with the substance and presumed messages of the film.[7]

II. THE MILBURN OPINION: THE ALLEGED ABSENCE OF PROTECTED SPEECH

Most, but not all, of the facts underlying the *Fowler* case were not in serious dispute. It is more generally the *constitutional significance* of the underlying facts that guides the case's resolution. Judge Milburn's opinion recites most of the relevant facts,

3. *Id.* at 658, 660.
4. *Id.* at 658.
5. *Id.* at 664.
6. *Id.* at 667-68 (Peck, J., concurring in result).
7. *Id.* at 668-70 (Merritt, J., dissenting).

including those already briefly alluded to, but it deals as well with some facts reasonably viewable as ultimately irrelevant. For example, he reports that the statutory grounds cited by the School Board for dismissing Ms. Fowler in July of 1984 had included alleged insubordination and conduct unbecoming a teacher.[8] Since he proceeded to determine that the "conduct unbecoming a teacher" standard was applicable and met in this case,[9] and that it was not unconstitutionally vague or overbroad as applied to Ms. Fowler's conduct,[10] he had no occasion to reach the grounds of alleged insubordination.[11]

The underlying activity at issue was Ms. Fowler's apparently unilateral decision to show the "R" rated movie, *Pink Floyd—The Wall*, to her ninth through eleventh grade public high school classes on the last day of the 1983-84 school year. This was a "noninstructional" day during which teachers devoted their attention to completing report cards.[12] A "noninstructional" schoolday, an institution bespeaking remarkable complacency in the face of the apparent gradual deterioration of American educational standards, apparently involves, depending upon one's choice of metaphor, the babysitting or warehousing of students, who remain in the physical custody of their teachers, without there necessarily being any effort made to educate them. While there may be some sort of low-level pedagogy involved—*e.g.*, techniques of collectively coping with enforced time wasting—the day is apparently best described as non-curricular, or as a hybrid school-nonschool day.

The particular circumstances in which alleged speech, or allegedly protected speech, may be evaluated on a noninstructional day may prove to be of legal benefit to a plaintiff teacher in Ms. Fowler's situtation. The teacher may be able to construct a valid argument that balances the interests of the public or the school in efficiently attaining its reasonable pedagogical objectives against her interests as a teacher[13] in freely speaking on arguably rele-

8. *Id.* at 658.
9. *Id.* at 666.
10. *Id.* at 664-66.
11. *Id.* at 666 n.10.
12. *Id.* at 658.
13. Presumably, the students may have interests both in their own socialization and education according to prevailing community conceptions and in their role as audience for the exercise of their teacher's free speech rights.

vant subjects.[14] She could plausibly argue that the state's interest is reduced, if not utterly waived, implicitly, by the very character of a noninstructional custodial school day.

The movie in question was apparently one with which Ms. Fowler was unfamiliar.[15] The students themselves had suggested bringing it in.[16] Despite some reservations,[17] Ms. Fowler had made arrangements to accommodate their request, apparently motivated by a desire to keep them occupied[18] and entertained[19] as she concentrated on the task of posting grades. She had deputized one of her students, age fifteen, to exercise censorial editing authority over the video portion of the movie, arming him with a file folder for his use in screening out unsuitable scenes.[20] The student had evidently been left effectively in charge on those several occasions on which Ms. Fowler left the room for unspecified lengths of time.[21] She had consulted several persons, including students, on the propriety of showing the film,[22] but did not herself preview it.[23] No one suggests that a less potentially objectionable movie could not have been selected.

It is possible to question the relevance of Ms. Fowler's failure to screen the film for classroom suitability in advance. For example, a teacher may well have a legitimate expectation of free speech protection if under appropriate circumstances she were to assign an acknowledged classic work on her own initiation, on the strength of its general cultural reputation, intending to impart or convey some sort of broad social idea, whether she wishes to affirmatively endorse such an idea or not. The availability of such protection would not depend upon her screening of the work in advance, even if it turned out to contain passages arguably unsuitable for the audience in question. The teacher in this situation could be regarded as having constitutionally "spo-

---

14. *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). This article will simply assume that Ms. Fowler's ordinary day-to-day subject matter teaching responsibilities encompassed what she assumed to be the themes or import of the movie in question.

15. *Fowler*, 819 F.2d at 658.

16. *Id.*

17. *Id.*

18. *Id.* at 665-66.

19. *Id.* at 664 n.8; *id.* at 669-70 (Merritt, J., dissenting).

20 *Id.* at 658.

21. *Id.* at 659.

22. *Id.* at 658.

23. *Id.*

ken," through the partially unfamiliar words of another.

On the other hand, Ms. Fowler's failure to preview a movie, the contents of which were unknown to her, for whatever reasons, seems to indicate her intent merely to occupy and entertain her students, rather than to convey, even if merely for purposes of reflection or discussion, any sort of rudimentary social idea to them.[24] What she knew, or could reasonably be charged with knowing, at the time of her initial decision to show the movie, was its apparent popularity, its "R" rating, any rumors of its controversial scenes which may have reached her, and the ages of both her intended audience and of her chosen student censoring agent. As it turns out, her student monitor's editing attempts, however effective, were arguably irrelevant, except insofar as the inherent sufficiency of the method chosen reflected on Ms. Fowler's judgment and sense of responsibility. The audio portion of the movie by itself apparently "contained enough offensive language to mandate an automatic 'R' rating under motion picture industry standards,"[25] and it had been played uninterruptedly.[26] Ms. Fowler presumably would have been aware of this, at the very latest by the time of her second afternoon screening of the movie.

A reasonable public could find Ms. Fowler's conduct and decisions to be excessively casual and ill-considered. Such a public attitude would, of course, not suffice to deprive otherwise constitutionally permissible conduct of its protection. But such an attitude could reinforce a broad public determination to insure that to the greatest extent possible, and otherwise consistent with the free speech clause, decisions as to curriculum, materials, and teaching methods should be left to the more direct, more politically responsible agents of the democratic electorate—the school board, and, in turn, its most directly responsible subordinates or agents, the superintendents and principals—rather than to individual classroom teachers. In effect, a reasonable democratic electorate could determine, based on its assessment

---

24. This writer has proposed such a standard as a minimally necessary condition for invoking the free speech clause, without, however, to this point attracting the majority support of the members of the Supreme Court. See Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149, 156, 166.

25. *Fowler*, 819 F.2d at 659.

26. *Id.*

of the level of skill and judgment that it might expect, or that it wished to pay for, among the range of individual classroom teachers, that teacher contracts should be drafted and interpreted to reasonably minimize the level of judgment and discretion authorized at their level.

Judge Milburn concluded that two of the factual findings of the district court were clearly erroneous. These findings had dealt with the degree of actual success achieved by the student-monitor armed with the file folder in editing the visual portion of the movie at both showings and on whether Ms. Fowler had formed an opinion as to the significance or value of the film at some point during the morning showing.[27] At least arguably, though, Judge Milburn's findings of clear error on the part of the trial court were not necessary to reach his result. If the School Board's case otherwise fell into place, the mere fact that Ms. Fowler had shown the film with unedited "R"-rated audio in the afternoon session, after having been made aware of its character during the morning screening could, by itself, supply sufficient grounds for sanctions. Similarly, her opinion as to the significance of the film, (despite the imperfect attention she gave to this evaluation), is at least arguably irrelevant to any alleged improprieties visited upon her captive, if eager, student audience prior to the point at which she formed this opinion.

There are two sticking points for Ms. Fowler's case at this juncture. The first, less significant, problem is that strictly speaking, the mere forming of an opinion as to the movie's significance, whether such an opinion was formed or crystallized during or after the screening of the movie, is not precisely the same thing as developing an *intent*, general or specific, that the film be shown to communicate some sort of broad social idea. In a word, a teacher's estimation or appreciation of a movie is not equivalent to her intent to *convey* what is held in estimation, even if without endorsement or approval.[28]

The second sticking point, already alluded to, is that intent to convey an idea does not operate retroactively. A fair reading of

---

27. *Id.* at 659 n.1.

28. At trial, Ms. Fowler testified that she believed in her designated student editor's statement that he had faithfully continued to edit the visual portion of the movie while she was out of the room. It is unclear whether the 15 year old student editor was chosen for his ability to heroically resist peer pressure, or for his ability to edit while averting his own eyes from the screen.

the testimony establishes that there was some period of time, at least during the morning showing of the movie, in which Ms. Fowler intended that it be shown, for whatever reasons, but did not apparently intend to convey, with or without endorsement, any particular, even rudimentary, sort of broad social idea. Judge Milburn's opinion can be read as asserting that if something like this intent to convey a social idea is not present, constitutionally protected speech is also not present. In this view, Ms. Fowler could raise no free speech defense[29] against allegations based on or stemming from those segments of time preceding the point at which she formed the requisite intent. Of course, while such an assertion is quite sensible on many counts,[30] it suffers the defect of not being one to which the Supreme Court has proved willing to subscribe.[31]

To the extent that the contemporaneous intent of a putative speaker was decisive on the issue of whether speech in the relevant sense is present, the other factors discussed by Judge Milburn would not be decisive, or even relevant. If it were to be

---

29. While a teacher might claim to be vindicating the free speech or freedom-to-hear rights of her student audience, it is doubtful that, on the merits, any violation of student free speech rights can be asserted under the facts of *Fowler*. *See generally* Wright, *Free Speech Values, Public Schools, and the Role of Judicial Deference*, 22 NEW ENG. L. REV. 601 (1987). For a sampling of the range of views on student speech rights in the public schools, see Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981); Freeman, *The Supreme Court and the First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis*, 12 HASTINGS CONST. L.Q. 1 (1984); Gardner, *Liberty and Compulsory Education*, in OF LIBERTY 109 (A.P. Griffiths ed. 1983); Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321 (1979); Guttman, *Children, Paternalism, and Education: A Liberal Argument*, 9 PHIL. & PUB. AFF. 338 (1980); Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to the "Rights,"* 1976 B.Y.U. L. REV. 605; Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647 (1986); Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278 (1970); Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 ILL. L. FORUM 746; van Geel, *The Search for Constitutional Limits on Government Authority to Inculcate Youth*, 62 TEX. L. REV. 197 (1983).

30. *See generally* Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149.

31. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65-66 (1981) (extending some measure of free speech protection, of indeterminate strength, to ordinary commercial live nude dancing). Note the willingness of the Court to countenance state law restrictions on commercial nude dancing that would be unthinkable as applied to more central or "core" modes of "speech," as in City of Newport, Ky. v. Iacobucci, 107 S. Ct. 383 (1986) (per curiam); New York State Liquor Auth. v. Bellancana, 452 U.S. 714 (1981) (per curiam).

found that Ms. Fowler had the requisite intent to broach or convey some sort of broad social idea, it would be immaterial, on the issue of speech *vel non*, that she had not previously screened the movie, that her attention had been otherwise occupied, that she had been absent from the room for periods of time, and even that she had not attempted to explain or discuss the film before or after either screening.[32] It would seem perfectly possible, for example, to have both the requisite idea-conveyance intent about, say, the movie *Shoah*, or Richard Attenborough's *Gandhi*, and yet to otherwise detach oneself from the film, as Ms. Fowler did.[33]

To the extent that she merely formed, eventually, a considered opinion that "the movie contained important, socially valuable messages,"[34] the problem of her *contemporaneous* intent remains. Of course, to the extent that the precise issue is that of speech *vel non*, courts are, and should be, reluctant to inquire into or independently assess the speaker's claim that the speech or material involved is "really" important, or valuable. The kind of contemporaneous intent that a speaker must evidence varies, however, with the way in which the legal problem is conceived. There is more than one way to conceptualize Ms. Fowler's legal circumstances. First, one might reasonably view what transpired as essentially outside the established school curriculum, but still involving an issue of free speech in the *context* of a public high school, with a teacher as the putative speaker. In this conception, the case would be thought of as a teacher-speech analogue to the student speech cases, the most authoritative of which are *Bethel School District No. 403 v. Fraser*[35] and *Tinker v. Des Moines Independent Community School District*.[36] This was

32. *See Fowler*, 819 F.2d at 659-60.

33. Perhaps more controversially, it may be true that nothing can take the place of the requisite intent. At least arguably, the free speech clause should not, at least considering the putative speaker's interest alone, protect a school teacher who distributes copies of *War and Peace* to her students under the bizarre misapprehension that the books are only paperweights, intended as useful gifts. This would be so even if the teacher later discovers his mistake and decides, in retrospect, that it was a splendid thing that his students were exposed to the broad social "ideas" conveyed through the novel.

34. *Fowler*, 819 F.2d at 660.

35. 106 S. Ct. 3159 (1986).

36. 393 U.S. 503 (1969).

the predominant view taken, and the line of cases principally emphasized, by Judge Milburn.[37]

An alternative view, and one which may be preferable because of its greater concreteness and specificity, would be to consider Ms. Fowler's case as one involving the dismissal of a public employee for exercising free speech rights in the course of her employment. In this conception, the most useful authority would then be cases such as *Connick v. Myers*[38] and *Pickering v. Board of Education*.[39] This alternative view was touched upon, but not logically pressed, by Judge Milburn.[40]

Which of these two distinct lines of cases is applied will determine whether one finds Judge Milburn's result justifiable or not. The thrust of the judge's rationale is that for speech to qualify as constitutionally protected, a speaker must, at a minimum, have a contemporaneous, expressive or communicative[41] intent to convey a "particularized message"[42] in circumstances indicating a great likelihood that it "would be understood by those who viewed it."[43] But in light of at least some Supreme Court case law in the general area of free speech, these alleged "minimum requirements" do not reflect the law in all free speech contexts.

This should not be surprising, despite the obvious logic in some of Judge Milburn's rationale. It is difficult to believe that the law would recognize as protected speech a college course assignment of Kahil Gibran's *The Prophet*, in view of its likely comprehensibility, but that it would deny protection to an otherwise similar assignment of Heidegger's *Being and Time*, on grounds that it would have a low probability of being understood by the students, any ambition and optimism of the assigning professor aside. The apt gridiron simile would be that "speech" is more

37. *See* in particular *Fowler*, 819 F.2d at 661.

38. 461 U.S. 138 (1983).

39. 391 U.S. 563 (1988). *See also* the recent case of Rankin v. McPherson, 107 S. Ct. 2891 (1987) (clerical employee in county constable's office not dismissable under the circumstances for orally endorsing to a co-worker a hypothetical future assassination of President Reagan).

40. *See Fowler*, 819 F.2d at 662.

41. *See id.* at 664.

42. *See id.* at 662.

43. *Id.* at 663.

like "a pass" than "a completed pass." And as we have seen, the Supreme Court has seen fit to extend at least some measure of free speech protection to activities that, it is fair to say, do not invariably involve an intent to convey a particularized message. An example would be commercial nude dancing which does not pretend to communicate anything other than entertainment.[44]

It is, therefore, perfectly possible to characterize the *Fowler* case as an entertainment-speech, teacher-speech analogue to the political-speech, student-speech case of *Tinker*. Since neither teachers nor students shed their free speech rights at the schoolhouse gate,[45] and since "entertainment" speech, devoid of any particularized message, may be constitutionally protectable, Judge Milburn's opinion offers no direct rebuttal to this characterization. His rebuttal is really more a matter of *perspective*, a perspective which drives his selection of the "appropriate" precedent.[46]

Accordingly, viewing *Fowler* as a public employee dismissal case in which the dismissal is contended to violate the employee's free speech rights, one reaches a result more consistent with that of Judge Milburn. This is because it has been clearly established in the speech-based dismissal cases, that it is necessary for a terminated employee to show not merely that she "spoke," but that her speech "may be 'fairly characterized as constituting speech on a matter of public concern.'"[47] This is an inquiry of law, rather than of fact,[48] and is determined by reference to the content, form, and context of the utterance as gleaned from the

---

44. *See supra* note 31. *See also, e.g.*, Fact Concerts, Inc. v. City of Newport, 626 F.2d 1060, 1063 (1st Cir. 1980), *rev'd on other grounds*, 453 U.S. 247 (1981) (free speech protection for the right to produce jazz concerts); Tacynec v. City of Philadelphia, 687 F.2d 793, 796 (3d Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983) (bands marching in Philadelphia Mummers parade engaged in a form of expressive entertainment protected by the first amendment).

45. Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 506 (1969).

46. *See generally* Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

47. Rankin v. McPherson, 107 S. Ct. 2891, 2897 (1987) (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)). Often, the court's formulation requires a showing that the employee speech have been on a matter "of public interest." *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Altman v. Hurst, 734 F.2d 1240, 1244 (7th Cir. 1984), *cert. denied*, 469 U.S. 982 (1984); Collins v. Robinson, 568 F. Supp. 1464, 1468 (E.D. Ark. 1983), *aff'd per curiam*, 734 F.2d 1321 (8th Cir. 1984). For an examination of the concept of speech on matters of public interest or concern in the public employee dismissal and libel contexts, *see generally* Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. (1987).

48. *See Connick*, 461 U.S. at 148 n.7, 150 n.10.

entire record.[49] The best that can be said about the speech fairly attributable to Ms. Fowler is that it does not easily fit within the presumed antithesis of speech on a matter of public interest or concern—speech on matters of merely private or personal concern.[50] Ms. Fowler was not merely airing some narrow personalized grievance.

On the other hand, what Ms. Fowler sought to "say" via the offending film, at the time, was essentially that her audience should be entertained and occupied. This was not speech on a matter or subject of general public interest or concern. The speech, therefore, intended only as entertainment, would not be constitutionally protected. This is because speech intended to entertain is protected only in an *appropriate context* (*e.g.*, nude dancing is protected expression in a barroom but not a school room). Nude dancing does not qualify as expression addressing matters of public interest or concern. It is protected on a completely different basis. Therefore, in the context of a public employee discharge, Fowler's free speech challenge would fail, without any need for interest balancing or any motivation analysis of the School Board's decision.[51]

It should be noted, however, that such distinctions are, in practice, a bit less tidy than this. The Supreme Court has, for whatever reasons, insisted that even where a public employee's speech does not address matters of public concern, such speech is not "'totally beyond the protection of the First Amendment.'"[52] It is tempting to suggest in response that if the speech in question does not address a matter of public interest or concern, the values or aims underlying the free speech clause[53] are presumably no more strongly implicated than they would be in a variety of obviously non-speech contexts. In any event, the Court has pronounced, that "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom

---

49. *See Rankin*, 107 S. Ct. at 2897.

50. *See, e.g.*, Rowland v. Mad River Local School Dist., 730 F.2d 444, 449 (6th Cir. 1982).

51. *See* the burden-shifting process required under Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) once the threshold speech on matters of public interest or concern test is met.

52. *Rankin*, 107 S. Ct. at 2897 n.7 (quoting *Connick*, 461 U.S. at 147).

53. *See* the discussion of the broad purposes generally thought to inform the free speech clause in Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

of a personnel decision taken by a public agency in reaction to the employee's behavior,"[54] at least in the absence of speech addressing matters of public interest and concern.

Now, a person in the position of Ms. Fowler would no doubt feel a strong temptation to argue that her speech had in fact, addressed matters of public interest. It would certainly be possible to interpret *Pink Floyd—The Wall* as addressing broad and important social issues of alienation, educational repression, and general authoritarianism.[55] But the issue is not whether it is possible to find social value in the movie, but rather whether the speaker *intended* that value to be conveyed at the time the movie was shown. It is clear that, at least for a time, Ms. Fowler intended only to entertain and occupy her students. She was unaware during this time of the film's content. Consequently, the film was not even a "subject" of speech, let alone a subject of general community interest or concern.

This result need not be intellectually disquieting. A speaker has only a limited practical interest, at best, in things not intended to be conveyed at the time of speaking. This is clear from a broader perspective. It would seem unlikely, for example, that a society would be enthusiastic about fighting and dying on foreign battle fields to protect a free speech right to "say" things utterly unintentionally. Accordingly, it is unlikely that constitutional drafters would have intended to give special protection to such a right.

Of course, it is also possible to argue that showing an *edited* version of a movie rumored to be sexually suggestive is itself some sort of a "statement" on a matter of public interest. In this view, the editing itself is seen to be a statement as to the propriety of showing such movies to persons under seventeen, quite apart from any other message that might be derived through the film's thematic content or implications. The problem with this argument is simply that, in its looseness, it proves too much. Every act of insider trading, of euthanasia, or of drinking and driving, in some sense implies a "speaker" who in effect "says" something like "I approve of, or am willing to tolerate, insider trading/euthanasia/drinking and driving under at least some cir-

54. *Rankin*, 107 S. Ct. at 2897 n.7 (quoting *Connick*, 461 U.S. at 147).

55. See the reported testimony of Ms. Fowler, *Fowler*, 819 F.2d at 659, and the assessment of Judge Merritt, *id.* at 668, 669 (Merritt, J., dissenting).

cumstances." The Framers obviously did not intend to convert every controversial act into a constitutionally protected "statement" on the rationale that the act addressed a matter of public interest because it challenged established public policy.

Focusing on the appropriate precedents, then, it would be perfectly reasonable to dismiss Ms. Fowler's free speech claim without any balancing of interests or analysis of the Board's motivation, though not precisely along the lines adopted by Judge Milburn. Seeking to blunt the effect of precedent such as the *Schad*[56] commercial nude dancing case, Judge Milburn correctly notes that the Supreme Court "has . . . indicated that in determining whether a given type of entertainment is protected by the First Amendment, it will look to the kind of entertainment involved and the appropriateness of the entertainment under the circumstances such as the time and place where offered."[57] The Court has applied this rationale even in speech-based dismissal cases, but only at that stage of analysis at which it seeks to determine whether the public employee's interest in the speech, and that of the public, outweighs the employer's and the public's interest in the efficient, unjudicialized operation, at a reasonable level of morale, of the public office in question.[58] At such a stage, the "manner, time, and place"[59] of the speech at issue becomes relevant. But this inquiry is undertaken only *after* it is first determined that speech, itself, and further, speech addressing a matter of public interest, is present.[60]

This should not be a surprising result. It is hardly obvious why the question as to whether an utterance or an act is speech at all should depend upon whether a school board (or a trial or reviewing court) finds it to be *appropriate under the circumstances.* This logic concludes that "inappropriate speech" is not only unprotected, but a contradiction in terms. Inevitably, one must distinguish the threshold question: "Is this speech in the constitutional sense?" from the follow up question, "If it is, do we want to protect this speech under these circumstances from

56. *See* 452 U.S. at 65-66.

57. *Fowler*, 819 F.2d at 664 n.8.

58. *See Connick v. Myers*, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968).

59. *Connick*, 461 U.S. at 152.

60. *See* id. at 149-54.

the sanction at issue?"[61] Judge Milburn's response to *Schad* may mark this distinction insufficiently.

With the speech issue behind him, Judge Milburn then briefly addresses Ms. Fowler's claims that the operative Kentucky statute,[62] which permits dismissal for "conduct unbecoming a teacher," is unconstitutionally vague, that it did not provide her with adequate notice of the likelihood of discipline for her conduct, and that her conduct did not fall within the intended or established scope of its provisions. Judge Milburn rejects all of these contentions.[63]

Ms. Fowler's vagueness challenge to the statutory language of "conduct unbecoming a teacher" implicates the classic due process principle which bars application of a statute that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[64] An inevitable tension arises in "vagueness" analysis when courts attempt to decide whether the language of the statute, in fact, makes it difficult to apply in borderline cases, or whether the plaintiff is simply asserting "vagueness" as a means of evading compliance with its literal terms.

The phrase "conduct unbecoming a teacher" is, unless judicially or administratively narrowed, hopelessly vague in borderline cases. Reasonable minds could differ as to its intended scope in at least some cases, even if not in Ms. Fowler's case itself. Yet, it must be said that whether hers was a borderline case or not, Ms. Fowler sped recklessly past clear, particularized warning signs. In showing an unpreviewed "R" rated movie to students known to be, in some cases, at least two years below the age normally allowed admittance to such movies, even though a desultory attempt at editing and supervision was made, and in apparently not exploring the students' reactions to the film at all,[65] Ms. Fowler engaged in conduct that could be objected to in

---

61. *See* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 89-92 (1982) (distinguishing between the "coverage" and "protection" of a right).

62. KY. REV. STAT. ANN. § 161.790(1)(b) (Baldwin 1986).

63. *See Fowler*, 819 F.2d at 664, 666.

64. *Id.* at 664 (quoting Connally v. General Const. Co., 269 U.S. 385, 391 (1926)).

65. *Id.*

almost purely quantitative terms. The risks of such conduct were predictable by her at the time.

What might, to an outsider, seem less predictable was the ferocity of the School Board in imposing on a tenured, fourteen year veteran teacher[66] the sanction of permanent dismissal as a penalty for such conduct. While some might infer an attitude of defiance from Ms. Fowler's statement that she would show the film again if given the chance,[67] her attitude appears more precisely to have been only that "she would show an edited version of the movie again if given the opportunity to explain it."[68]

Less sympathetically, it might be said that due process does not require reasonable predictability of the most severe but otherwise permissible sanction. More broadly, the School Board's interpretation of, or resort to, a statute, and even the terms of the statute itself, in the long term, are no less bargainable by teachers' unions on behalf of their members than any other non-economic issue. In principle, it should be possible for those who bargain on behalf of teachers to extract a policy of moderation in this regard from the school boards in exchange, perhaps for modest concessions by the teachers in other areas.[69] To the extent that public school teachers have focused in their contract bargaining solely upon issues unrelated to teacher discipline, they deserve no more and no less sympathy than we would ordinarily give to other competent adults who knowingly choose to accept risks in exchange for other benefits.

In deciding the final issue as to whether the conduct of Ms. Fowler fell, as a matter of statutory interpretation, within the scope of "conduct unbecoming a teacher," Judge Milburn relied upon two recent Kentucky cases involving conduct that would ordinarily be regarded as more egregious than that engaged in by Ms. Fowler. In *Board of Education v. Wood*,[70] two teachers had committed the criminal act of smoking marijuana in their apartment with two fifteen-year-old students.[71] In *Board of*

---

66. *Id.* at 658.
67. *Id.* at 660-61.
68. *Id.* at 659-60.
69 *See generally* Wright, *A Contractual Theory of Due Process*, 21 VAL. U.L. REV. 527 (1987).
71. 717 S.W.2d 837 (Ky. 1986).
71. *Id.* at 839-40.

Education v. McCollum,[72] a teacher was discharged under the "conduct unbecoming a teacher" provision for filing false sick leave affidavits and lying about time spent on a special home instruction program.[73] The latter case at least involved a wilful, insubordinate rule violation, as compared to Ms. Fowler's mere lack of judgment and general irresponsibility.

The Kentucky Supreme Court in *Wood* explained that:

> The purpose of teacher tenure laws is to promote good order in the school system by preventing the arbitrary removal of capable and experienced teachers by political or personal whim . . . . A teacher is held to a standard of personal conduct which does not permit the commission of immoral or criminal acts because of the harmful impression made on the students. The school teacher has traditionally been regarded as a moral example for the students.[74]

Both sides in the *Fowler* case could have reasonably drawn some comfort from this generalized judicial statement of statutory purpose. Ms. Fowler can reasonably have called her discharge "political" in a broad sense of the term, but not in a narrow, partisan sense. Her actions were, it is true, not "immoral" in the egregious sense at issue in *Wood*. In that case, students had been encouraged to intentionally violate the criminal law. However, a reasonable board of education could nevertheless refer to Ms. Fowler's conduct as immoral without speaking eccentrically. Arguably, she did not on this occasion set a "moral example" for her students.

If general statements of statutory purpose such as those expounded in *Wood* do not satisfactorily resolve the applicability of the statute to Ms. Fowler's conduct, then the resolution might be found in the legal principle that encourages federal courts to defer to reasonable interpretations of state stautes made by local administrative agencies. The principle is well established that if a state statute does not by its own terms unambiguously *compel* a particular interpretation, the courts are still *not authorized* to substitute their own interpretation for a *reasonable* one made by the local factfinder.[75] It would seem, in this regard, excessive to

---

72. 721 S.W.2d 703 (Ky. 1986).

73. *See id.* at 704.

74. 717 S.W.2d at 839.

75. The leading recent case along these lines is Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 (1984). *See* also the recent case of INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1224-25 (1987) (Scalia, J., concurring in the judgment) and Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707, 714 (1985).

categorize the interpretation and application of the statutory standard made by the school board in the *Fowler* case as unreasonable, even if reasonable minds could differ on the result.

Of course, it is possible to question whether this degree of judicial deference is due in this case. *Fowler* does not involve a highly technical interpretation by a centralized administrative agency based on special accumulated expertise,[76] at least in any rigorous sense, nor does it involve any formally promulgated prior interpretation by the agency.[77] Nevertheless, once all constitutional issues are set aside, it seems clear that due sensitivity to the values of localized democratic decision making and institutional legitimacy demands deference by unelected federal courts to the reasonable interpretations of a state statute that implicates local social values, made by a local politically responsible body.

III. THE PECK OPINION: A JUSTIFIED DISMISSAL DESPITE THE PRESENCE OF SPEECH

Judge Peck concurred in the result with Judge Milburn.[78] He would have conceded that Ms. Fowler's conduct involved constitutionally protected speech,[79] but would have gone on to conclude that the School Board could have legitimately dismissed Ms. Fowler if its decision had been based on or motivated by constitutionally permissible grounds exclusively.[80]

Judge Peck began by correctly noting that much of the authority relied upon by Judge Milburn to conclude that speech in a constitutional sense was not present in *Fowler* had principally dealt with *symbolic conduct.* Those cases, he pointed out, which had addressed the circumstances under which symbolic conduct could constitute protected speech, "do not lend themselves to the reverse purpose of defining what kind of communication cannot be expressive."[81] We have seen above,[82] however, that while Judge Milburn's particular approach to the issue of speech *vel non* is suspect, his result may be defensible on other grounds.

---

76. *See Chevron*, 467 U.S. at 844 (quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961)).

77. *See id.* at 843-44.

78. *Fowler*, 819 F.2d at 666-68 (Peck, J., concurring in result).

79. *Id.* at 667 (Peck, J., concurring in result).

80. *Id.* at 668 (Peck, J., concurring in result).

81. *Id.* at 667 (Peck, J., concurring in result).

82. *See supra* notes 24-61 and accompanying text.

Judge Peck did not discuss the threshold[83] issue of whether, under the *Pickering-Connick* line of cases, Ms. Fowler's speech rose to the level of speech addressing a matter of public interest or concern.[84] Instead, Judge Peck would have held that the trial court "erred in its finding that, but for Ms. Fowler's constitutionally protected activity of communicating various ideas and political thoughts to her students, she would not have been fired."[85]

Under the *Mount Healthy* mixed employer motive test, a plaintiff employee must show that her constitutionally protected conduct or speech was a substantial or motivating factor in the board's decision to dismiss her, but the board must then be given the opportunity to show that it would have reached the same decision if it only considered her unprotected conduct.[86]

Consistent with the *Mount Healthy* approach, Judge Peck sought to distinguish between permissible and impermissible motivations affecting the Board's decision to discharge Ms. Fowler. He reasoned that since courts were required to give deference to reasonable school board decisions, it was appropriate for the *Fowler* court to find that the Board in that case had relied only upon *permissible* considerations in its decision to dismiss Ms. Fowler. In making this argument, Judge Peck refers to the "intertwining" of permissible and impermissible grounds affecting the Board's decision to dismiss Ms. Fowler,[87] and he is criticized for this by Judge Merritt in dissent.[88] However, Judge Peck's choice of the term "inadequate" is misleading; he clearly means something essentially opposite. If permissible and impermissible motivations were in fact, inseparably, inextricably intertwined, the Board could hardly

---

83. *See, e.g.*, Mings v. Dep't of Justice, 813 F.2d 384, 387 (Fed. Cir. 1987).

84. That one intends to apply a *Mount Healthy* mixed-employer motive inquiry does not obviate the prior need to show speech on a matter of public interest. *See* Wren v. Spurlock, 798 F.2d 1313, 1317 (10th Cir. 1986); Ferrara v. Mills, 781 F.2d 1508, 1512 (11th Cir. 1986). While *Wren* and *Ferrara* take the most logical approach in integrating *Pickering, Connick,* and *Mount Healthy,* a variety of less convincing approaches have been judicially endorsed. *See* the interesting, if somewhat dismaying, discussion in Hatcher v. Board of Pub. Educ. and Orphanage, 809 F.2d 1546, 1556 & 1556 n.19 (11th Cir. 1987).

85. *Fowler*, 819 F.2d at 667-68 (Peck, J., concurring in result).

86. *See Mount Healthy*, 429 U.S. at 287; Allen v. Scribner, 812 F.2d 426, 433 (9th Cir. 1987); Rowland v. Mad River Local School Dist., 730 F.2d 444, 449-50 (6th Cir. 1984).

87. *Fowler*, 819 F.2d at 668 (Peck, J., concurring).

88. *Id.* at 669, 670 (Merritt, J., dissenting).

have discharged its burden of showing that the impermissible motivations were not a but-for cause of the discipline.[89]

It is, therefore, crucial to Judge Peck's analysis that permissible and impermissible board motivations be distinguishable. To a degree, this seems to have been possible in the instant case. Ms. Fowler's poor judgment in not previewing the "R"-rated film and her casualness in providing only for a student monitor armed with a file folder to "edit" out objectionable segments seem to constitute permissible considerations that the Board might have relied upon to dismiss her. These seem as severable from impermissible board considerations, such as mere ideological disagreement, as circumstances are commonly likely to admit.

But, more controversially, Judge Peck also seeks to distinguish between "improper" considerations (such as perceived anti-establishment or anti-authoritarian political or social themes or messages in the film) and "proper" considerations (including vulgarity, violence, sexuality, and general unsuitability for the age group involved).[90]

His opinion gives us no reason to believe that there is any surgical distinction between such impermissible "content" motivations and permissible "form" motivations, beyond the roughest approximation. At least where the speaker has intended to endorse, or at least raise for consideration, a message of liberation and anti-authoritarianism, and is disciplined for doing so, it is entirely open for her to argue that such punishment, allegedly based on vulgarity of "form," in effect requires her to send a different "message." To require a change in form is to require a change in content. One is, in effect, not saying the same thing,[91] or saying it as powerfully.[92] While this observation can be overdrawn[93]—one can imagine a less vulgar formulation being in fact, both *more* articulate and *more* powerful—it evidently has

89. *See Mount Healthy*, 429 U.S. at 287.

90. *Fowler*, 819 F.2d at 668 (Peck, J., concurring).

91. *See, e.g.*, Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1, 19 n.98 (1974).

92. *See* Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 141 (1981); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 244 (1983); Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 142 (1982).

93. *See* FCC v. Pacifica Found., 438 U.S. 726, 743 n.18 (1978) (opinion of Stevens, J., joined by Burger, C.J., and Rehnquist, J.).

some force, at least as regards certain of the considerations that are allegedly constitutionally permissible in Judge Peck's analysis.[94]

IV. THE MERRITT OPINION: AN UNJUSTIFIED DISMISSAL BASED ON SPEECH

At least by inference, the essential thrust of Judge Merritt's dissenting opinion has been discussed above. In brief, he determined that the movie in question presented a message warning of the adverse consequences of excessive authoritarianism.[95] He observed that what may strike one federal judge as "gross and bizarre"[96] may seem to another to be "mild and not very 'sexually suggestive.'"[97] In this, Judge Merritt echoed the aesthetic relativism embodied in Justice Harlan's classic observation that "it is . . . often true that one man's vulgarity is another's lyric."[98]

Judge Merritt was able to deploy the commercial nude dancing case of *Schad v. Borough of Mount Ephriam*[99] against Judge Milburn's apparent claim that pure entertainment could not fall within the scope of constitutionally protected speech, but as we have seen,[100] this ambitious premise was unnecessary to Judge Milburn's central argument. However, his position is less clear with respect to Judge Peck's argument that the court should be deferential in determining that the Board relied upon a constitutionally permissible basis, (such as the vulgarity and unsuitability of the film) to dismiss Ms. Fowler, even though it was possible that impermissible motivations (*i.e.*, an ideological dis-

---

94. Judge Peck additionally sought to bolster his argument for judicial deference in this context by citing Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986), but it should be noted that *Fraser* involved more disruption of the classroom educational process than *Fowler*. *See id.* at 3162.

95. *Fowler*, 819 F.2d at 669 (Merritt, J., dissenting).

96. *Id.* at 666.

97. *Id.* at 669 (Merritt, J., dissenting).

98. Cohen v. California, 403 U.S. 15, 25 (1971), quoted in *Fowler*, 819 F.2d at 670 (Merritt, J., dissenting). Courts have often quoted this passage without the qualifying language of "oftenness," as a flat relativist principle. *See, e.g.*, State v. Authelet, 120 R.I. 42, 385 A.2d 642, 648 (1978). *But cf.* Lewis v. City of New Orleans, 415 U.S. 130, 140 (1974) (Blackmun, J., dissenting) (referring to "the easy and imagined self-assurance that 'one man's vulgarity is another's lyric.'"). For philosophical background, see, *e.g.*, RATIONALITY AND RELATIVISM (M. Hollis & S. Lukes eds. 1983).

99. 452 U.S. 61, 65-66 (1981).

100. *See supra* section II.

taste for the "message" of the film) may have been "intertwined." He simply concludes that "I do not believe an argument based on intertwining [of permissible and impermissible motives] can be used to suppress protected speech; vulgarity should not be allowed to subsume that which is protected."[101]

As discussed above, however, Judge Peck's argument in fact relies not on any intertwining of motive, but on the (at least partial) separability of permissible and impermissible motives.[102] Judge Merritt does not explicitly challenge such a premise. His conclusion also seems too categorical, if it is taken literally. Especially in a public school context, it seems clear that at some point, even vulgarity or violence that is considered essential to the intended message, or to its full impact, could legitimately be viewed as unacceptably extreme. One could, for example, undoubtedly make a coherent point about social alienation to a captive or non-captive audience of ten-year-olds by exposing them to the most gruesome sort of graphically filmed violence. Presumably, an extreme of vulgarity is no more sacrosanct than an extreme of violence. But it is probable that Judge Merritt himself believes that some such limits to free speech are appropriate and can be imposed, at least in extreme cases.

V. CONCLUSION

All three opinions in *Fowler* enjoy substantial plausibility, but all can be seen as ultimately flawed, at least at some level of detail. Accordingly, *Fowler* reflects the fact that "the decided cases fail to provide any comprehensive scheme for delineating the role of the Constitution in resolving curricular and pedagogical conflicts."[103] The decided cases often seem fact-sensitive in this regard, so that no single case tends to have much controlling

---

101. *Fowler*, 819 F.2d at 670 (Merritt, J., dissenting). It should be borne in mind that the major thrust of the argument against pedagogical vulgarity is not that the students have never seen vulgar, violent, or sexual materials outside of class, and will be stunned by first encountering them in the school, but rather that vulgarity ought not to be practically legitimized through its use in the public school context.

102. Judge Merritt again refers to the "conflation of vulgarity and anti-establishment ideas set forth by Judge Peck." *Id.* (Merritt, J., dissenting).

103. Hunter, *Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools*, 25 WM. & MARY L. REV. 1, 54 (1983).

power.[104] If there is any mainstream position on this general range of issues, it is perhaps best expressed by the view that while "[t]he first amendment does not give to the teacher autonomy to determine either what or how he shall teach,"[105] this general rule is subject to some range of exceptions.[106]

It has been properly observed that "cases involving restrictions on teachers' rights of curricular control are often erroneously viewed as censorship cases when the real issue is who should make curricular choices given the fact that someone has to make [them]."[107] Such an observation gets the analysis off to a sensible start, but in this fact-sensitive area of the law, it cannot contribute much to the resolution of a particular case. If one adds to this the relevant idiosyncracies of the *Fowler* case, (the absence of a genuinely relevant intent to speak, in a constitutional sense, on the part of Ms. Fowler, the non-instructional character of the school day,[108] the dubious attempts at delegated editing,[109] and the apparently disproportionate severity of the punishment imposed),[110] one despairs of resolving *Fowler* on the basis of any mechanical application of broad principles.

On the analysis recommended in this article, it is decisive in resolving *Fowler* that there was an absence of any speech addressing a matter of public interest or concern. The plaintiff's

---

104. Among the lower court cases not extensively discussed in *Fowler*, and of admittedly varying relevance, are cases such as Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); Brubaker v. Board of Educ., 502 F.2d 973 (7th Cir. 1974); Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Cary v. Board of Educ., 427 F. Supp. 945 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979); Wilson v. Chancellor, 418 F. Supp. 1358 (D. Or. 1976); Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass.), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970).

105. Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479, 1503 (1972).

106. *See id.*

107. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1356 (1976).

108. 819 F.2d at 658.

109. *Id.*

110. In view of the less than fully crystallized status of the law of substantive due process, it is at least worth considering whether permanent dismissal, as opposed to a lesser sanction, is a constitutionally permissible punishment in light of the nature and quality of Ms. Fowler's alleged offense. *See, e.g.*, Regents of University of Michigan v. Ewing, 106 S. Ct. 507 (1986); Schaper v. City of Huntsville, 813 F.2d 709 (5th Cir. 1987) (substantive due process right to continued public employment recognized); Crook v. Baker, 813 F.2d 88 (6th Cir. 1987).

failure to meet that threshold requirement is fatal to her free speech case. While it is, of course, possible to deny the legitimacy of imposing such a requirement, doing so is consistent with the scope of the broad run of values and purposes widely thought to underlie the free speech clause in the first place.[111]

111. *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).